United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1581

In The

United States Court of Appeals

For The Second Circuit

ROBERT R. FELTON and EDWARD J. EGAN,

Plaintiffs-Appellants,

vs.

WALSTON AND CO., INC., JAMES NISSAN MARINE MIDLAND BANKS, INC., MARINE MIDLAND BANK-WESTERN, MARINE MIDLAND BANK-NEW YORK, MARINE MIDLAND BANK-ROCHESTER, MARINE MIDLAND BANK-CENTRAL, MARINE MIDLAND BANK-SOUTHERN, MARINE MIDLAND BANK OF SOUTHEASTERN NEW YORK, N.A., MARINE MIDLAND BANK-NORTHERN, MARINE MIDLAND BANK-EASTERN NATIONAL ASSOCIATION, MARINE MIDLAND BANK-CHAUTAQUA, NATIONAL ASSOCIATION, MARINE MIDLAND-TINKER NATIONAL BANK, INC., DRYFUS-MARINE MIDLAND, INC., JOEL BROWNSTEIN, 3 I CO./ INFORMATION INTERSCIENCE, INC., GERALD L. BRODSKY, MAURICE BRODSKY, ARTHUR W. ELIAS, MARVIN S. RIESENBACH, MARVIN SCHILLER, IRVING H. SHER, STICHTING EXCERPTA MEDICA (EXCERPTA MEDICA FOUNDATION), MEDISCHE REFERANTAN (EXCERPTA MEDICA) N.V., INFONET (EXCERPTA MEDICA-RESCONA) N.V., ELTRAC (INFONET) N.V., PETER WARREN, MAIN L/ FRENTZ AND CO., FRED VON EUGEN, S. KIM KESSLER AND GERALDINE KESSLER,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS

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DOCKET NO. 74-1581

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BRIEF OF DEFENDANTS-APPELLEES MARVIN S. RIESENBACH, ARTHUR W. ELIAS AND IRVING H. SHER

APPELLEES' BRIEF

Introduction

This is an appeal from the Order of the Honorable Dudley B. Bonsal, filed March 29, 1974, dismissing the fourth complaint herein, without leave to amend, pursuant to Rule 9(b) of the Federal Rules of Civil Procedure on the ground that plaintiffs failed to allege fraud and conspiracy with sufficient particularity.

Issues Presented for Review

1. Did the District Court properly dismiss the fourth complaint, without leave to amend, on the ground that such complaint failed to allege fraud and conspiracy with sufficient particularity?

2. Did the District Court properly exclude matters outside the pleadings in deciding the motion to dismiss made by appellees Marvin S. Riesenbach, Arthur W. Elias and Irving H. Sher?

3. Is appellants' attempt to argue the facts irrelevant to the District Court's determination

of the motion to dismiss?

Counter-Statement of the Case

A detailed statement of the nature of the case and the history of the proceedings can be found in the appellate papers submitted on behalf of appellees Marine Midland and Brownstein and will not be restated here. However, the salient facts of the case with respect to the appellees Riesenbach, Elias and Sher deserve some additional amplification because their case for affirmance is even more compelling.

Appellants' latest amended complaint, the last in a series of four unsuccessful attempts to adequately state a claim for relief, was dismissed by the District Court, without leave to amend, pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, on the ground that it failed to allege fraud and conspiracy with sufficient particularity.*

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*Although the District Court granted appellees' motion to dismiss the fourth complaint for failure to meet the requirements of Rule 9(b) the District Court nevertheless intimated that the "Court would deny the plaintiffs' motion for an order permitting this action to proceed as a class action" (Memorandum Opinion, 563a). In passing on that issue, Judge Bonsal noted that "Mr. Felton's experience and skills in negligence litigation do not qualify him adequately to protect the interests of the class he seeks to represent" and that the Court was "not persuaded that the questions of law

The sole references to appellees Riesenbach, Elias and Sher in the last version of the complaint appeared in paragraphs 22 and 28(e) (494a; 497a):

"22. Defendants Arthur W. Elias, Marvin S. Riesenbach, Marvin Schiller and Irving H. Sher were officers, directors and shareholders of Information Company of America, I.C.A. and Information Corporation of America on June 30, 1971 when 3 I Co. purchased all the assets of these worthless corporations with 3 I Co. common stock valued at $3,053,857. On or about September 1, 1971, Arthur W. Elias became President and Director of 3 I Co., Marvin S. Riesenbach became Vice President, Treasurer and a Director of 3 I Co. and Marvin Schiller and Irving H. Sher became Vice Presidents of 3 I Co.

"(e) Defendants 3 I Co. and Brodsky conspired and schemed with defendants Arthur Elias, Marvin Riesenbach, Marvin Schiller and Irving Sher to falsely and deceptively declare to the investing public that 3 I Co.'s purchase of all the assets of Information Company of America, I.C.A. and Information Corporation of America was a major viable acquisition. These defendants did not act at arms-length for their purchase negotiations and thus 3 I Co. paid

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and fact sought to be raised therein are common to the alleged 8,000 or more members of the class; nor is it apparent that if there are such common questions, they would predominate" (id.) Appellants Riesenbach, Elias and Sher assert that the District Court properly decided that appellants failed to satisfy the requirements of Rule 23 and agree with the argument on this subject set forth in the appellate papers submitted by appellees Marine Midland and Brownstein.

$2,960,904 for worthless intangible assets."*

It is patently obvious that these ambiguous and generalized contentions of fraud and conspiracy are contrary to the requirements of the Federal Rules of Civil Procedure and demonstrate appellants' inability to frame a proper complaint, even after four attempts.

POINT I

THE DISTRICT COURT DID NOT ERR IN DISMISSING THE AMENDED COMPLAINT, WITHOUT LEAVE TO AMEND, SINCE APPELLANTS' FOURTH ATTEMPT TO ADEQUATELY STATE A CLAIM FOR RELIEF FAILED TO ALLEGE FRAUD AND CONSPIRACY WITH SUFFICIENT PARTICULARITY

The District Court correctly observed that with respect to a motion to dismiss a complaint for failure to allege fraud and conspiracy with particularity in accordance with Rule 9(b) of the Federal Rules of Civil Procedure, a plaintiff is required "to set forth the specific facts and circumstances which he alleges constitute fraud" (560a).**

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*Furthermore, appellant Felton conceded that he made his final purchases of 3I stock on June 7, 1971 which was before he contends that these defendants even came into the picture (522a). Hence, he cannot, and does not, allege he relied on such allegedly false information in purchasing his stock. The persistent effort by Mr. Felton, therefore, to tie these appellees into an alleged conspiracy covering years of activity before they became involved in any way with 3I is patently frivolous, particularly in the absence of a single factual allegation in support of the conclusory contentions of fraud and conspiracy.

**Contrary to appellants' assertion that all appellees

The Second Circuit has recently held in Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972) that:

> "'Mere conclusory allegations to the effect that defendant's conduct was fraudulent or in violation of Rule 10b-5 are insufficient' [citing Shemtob v. Shearson, Hammill & Co., 448 F.2d 442, 444 (2d Cir. 1971]; '. . . there must be allegation of facts [in a complaint under Rule 10b-5] amounting to deception in one form or another.' [citing O'Neill v. Maytag, 339 F.2d 764, 768 (2d Cir. 1964)]."

Due to the possible grave damage to reputation that can result from the assertion of serious wrongdoing, Rule 9(b) requires plaintiffs to set forth more completely and in greater detail the factual bases upon which they allege they are entitled to relief. See, Frazler v. Stellar Industries, Inc., 72 Civ. 2829 (C.D. Cal., Memorandum Opinion filed November 15, 1973).

As was pointed out at great length by the District Court, appellants' amended complaint does not comply with the specificity requirement of Rule 9(b) of the Federal Rules of Civil Procedure:

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waived their right to challenge the complaint pursuant to Rule 9(b) by accepting and answering plaintiffs' original complaint, appellees Riesenbach, Elias and Sher did not answer appellants' complaint and in fact raised their Rule 9(b) objection in their first responsive papers to the complaint. Therefore, appellees Riesenbach, Elias and Sher cannot be held to have waived their Rule 9(b) objection. Surely appellants are not contending that any of the other appellees could have waived appellees Riesenbach, Elias and Sher's rights in this case.

> "The amended complaint's allegations are made 'on information and belief,' contrary to Rule 9(b). Segal v. Gordon, supra at 608. The amended complaint does not set forth the dates on which either of the plaintiffs made purchases or sales of 3i Co. stock, nor does it state whether the plaintiffs relied on the statements and declarations alleged to have been false and misleading. While the amended complaint alleges that defendants made "misleading statements", "conspired and schemed", "aided and abetted" each other, and "deceptively declare[d] to the investing public" that 3i Co. had made "major viable acquisitions", these statements and declarations are not identified nor particularized as to when they were made, to whom they were addressed, or whether they affected or related to transactions in 3i Co. stock. Nor do plaintiffs allege in what respect the declarations and statements were false, misleading, or deceptive except to make conclusory allegations such as, for example, that the data bank license purchased by 3i Co. was "worthless" and that the defendants "approved, authorized and/or acquiesced in the fraud perpetrated upon plaintiff and the Class." (Memorandum Opinion, 562a)

Furthermore, appellants' barebone allegations of conspiracy do not satisfy the requirements of Rule 9 either. As was stated in Segal v. Gordon, supra at 607:

> "'Mere general allegations that there was fraud, corruption or conspiracy or characterizations of acts or conduct in these terms are not enough no matter how frequently repeated' (citations omitted). . . Although the Federal Rules permit statement of ultimate facts, a barebones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.'"

In view of appellants' repeated inability to frame a proper complaint, the Second Circuit's recent statement in Mooney v. Vitolo, 435 F.2d 838, 839 (2d Cir. 1970)

is equally applicable here:

> "Plaintiffs here were twice given an opportunity to replead. Therefore, it was within the sound discretion of the District Court to deny leave to replead on the third attempt. Fed.R.Civ.P. 15(a)" (citations omitted)

The District Court below therefore correctly concluded that:

> "Since plaintiffs have had ample prior opportunity to frame a complaint meeting the requirements of Rule 9(b), permitting a further opportunity to amend the complaint would only serve to delay the ultimate disposition of this action." (562a-563a)

In view of the fact that appellants have been afforded four opportunities to frame a complaint meeting the requirements of the Federal Rules of Civil Procedure, the District Court acted within its sound discretion in denying yet another attempt to replead.

POINT II

THE RECORD CLEARLY DEMONSTRATES THAT THE DISTRICT COURT DID NOT CONSIDER ANY MATTERS OUTSIDE THE PLEADINGS IN DETERMINING THE RIESENBACH-ELIAS-SHER MOTION TO DISMISS THE AMENDED COMPLAINT

Even a cursory examination of the record indicates that the District Court did not consider any matters outside the pleadings in determining any of the motions to dismiss and, in particular, the Riesenbach-Elias-Sher motion to dismiss. The simple fact is that appellants have interposed no such extraneous material

whatsoever in opposition to the Riesenbach-Elias-Sher motion to dismiss. Appellants, however, seek to confuse the realities of the situation by lumping together any and all motions made by any and all appellees and insisting that any exhibits or materials relating to these various motions must have been considered by the Court in deciding every motion before the Court. Not only is appellants' reasoning logically defective, but the proceedings before the District Court in no way lend themselves to such an analysis.

Appellants' argument with respect to their assertion that the motions to dismiss should have been disposed of pursuant to Rule 56 of the Federal Rules of Civil Procedure, is essentially a two pronged theory which does not even allude to the motion filed by Riesenbach, Elias and Sher. In their brief on appeal, appellants list various materials which they contend the Court incorrectly considered in deciding the Riesenbach-Elias-Sher motion to dismiss (Brief, p. 17). None of these materials, however, were interposed against the Riesenbach-Elias-Sher motion to dismiss. For example, the verified affidavit of November 8, 1973 (287a-295a) to which appellants refer was submitted by appellants in opposition to the Main Lafrentz summary judgment motion. Similarly, the two affidavits with

exhibits annexed (368a-374a and 377a-391a) were submitted by appellants in response to Main Lafrentz's opposition to appellants' motion to amend the complaint and Marine Midland's response to appellants' motion to amend its complaint, respectively. Significantly, none of these "extraneous" materials were directed or interposed with respect to the motion to dismiss filed by appellees Riesenbach, Elias and Sher.

The heart of appellants' argument seems to be the assertion that the District Court indicated that it would read certain exhibits in deciding appellees' motion to dismiss. In support, appellants contend that in the:

> "Transcript of oral argument on defendants' motions to dismiss, January 7, 1974, the court in reply to plaintiffs' reference to Exhibits annexed to plaintiffs' opposition memorandum stated: 'I saw that. I will read the exhibits, you need not read them to me' (547a)" (Brief, p. 16).

The utilization of this quote, however, gravely distorts the record. The January 7, 1974 oral argument was not, as appellants contend, concerned solely with the motions to dismiss filed by various appellees. The transcript of that hearing makes clear that the oral argument was also concerned with the Main Lafrentz motion for summary judgment. Appellees have attempted to distort reality by ignoring the context in which the Court made

its statement. At the time the Court made the statement that it would read appellants' exhibits, appellant Felton and the Court were engaged in a colloquy with respect to the pending Main Lafrentz motion for summary judgment. In fact, appellant Felton's preceding statement to the Court (which appellant Felton cavalierly ignores) makes it abundantly clear that the consideration of these exhibits was being discussed with regard to the Main Lafrentz summary judgment motion and not with respect to any of the pending motions to dismiss.

> "Mr. Felton. . . I don't want to say that the thrust of my objection to the summary judgment rests only on 34-E, but I said before there are genuine issues of fact as to every allegation as to Main Lafrentz. What I have done, I have sent along with this opposition memorandum some exhibits, among which is --
>
> "THE COURT: I saw that. I will read the exhibits. You need not read them to me" (547a).

Appellees' mischaracterization of the substance of the oral argument before the Court and of the materials extracted therefrom, represents a flimsy attempt to confuse this Court about the nature of those proceedings and the significance of the District Court's statements.

In sum, the record is clear that the District Court did not consider any matters outside the pleadings in disposing of appellees' motions to dismiss the amended complaint and, in particular, in granting the motion to

dismiss of appellees Riesenbach, Elias and Sher. Furthermore, the Court's opinion specifically limits itself to ruling on the sufficiency of the complaint and indicates that no extraneous materials were considered by the court in deciding the motion to dismiss before it. In Duane v. Altenburg, 297 F.2d 515, 518 (7th Cir. 1962), the Seventh Circuit stated that it will not impute error where the record does not require it:

> "And here, in the absence of the actual entry of a judgment for defendants on the alleged Bellwood-Berkeley claim, the record does not afford a basis for any assumption that the able and experienced trial judge acted under a misapprehension that Rule 12(b) of the Federal Rules of Civil Procedure (28 U.S.C.A.) authorized treatment of the motions to dismiss as motions for summary judgment and disposition as provided in Rule 56 relating to summary judgment. To have so disposed of the matter on the affidavits here involved would have been error. And we will not impute error where the record does not require it. We conclude that the District Court's order, as indicated by the disposition it made in dismissing the complaint, was based on the conclusion that the complaint failed to state a claim upon which relief can be granted. It makes no mention of summary judgment."

The holding in Altenburg is equally applicable in this case. The District Court opinion clearly indicates that the complaint was dismissed for failure to adequately state a claim for relief in accordance with the Federal Rules of Civil Procedure. Furthermore, the Court clearly stated that it did not reach the motion for summary judgment. Therefore, this Court should not impute error

(particularly where none exists) and assume that the District Court considered matters outside the pleading in the absence of any persuasive indication that the District Court considered any such matters, particularly where the Court stated that its decision was based solely upon an analysis of appellants' amended complaint (see 558a-562a).

POINT III

APPELLANTS' ATTEMPT TO ARGUE THE FACTS IS IRRELEVANT TO THE COURT'S DETERMINATION OF THE RIESENBACH-ELIAS-SHER MOTION TO DISMISS THE AMENDED COMPLAINT

It is axiomatic that in considering a motion to dismiss a complaint for failure to allege fraud and conspiracy with specific particularity, the fact that there may or may not be genuine issues of fact is irrelevant to the determination of the motion to dismiss. The motion to dismiss only addresses the issue of whether or not the appellants have adequately stated a proper claim for relief. In Point II of their appellate brief, appellants argue that assuming that the "lower" Court did not commit the reversible error alleged in Point I [i.e., did not consider matters outside the pleadings and thus convert the motion to dismiss to a summary judgment motion], the dismissal of

the complaint was still error because "plaintiffs' affidavits, exhibits, defendants admissions in prior pleadings and relevant portions of defendants' testimony presented to the Court below show genuine issues as to material facts and that this case must go to trial (Rule 56 F.R.C.P.)" (pp. 18-19, footnotes omitted). The glaring defect in this reasoning is that acceptance of the premise of the argument precludes the conclusion which appellants seek to elicit. If the District Court correctly decided the motion to dismiss as a motion to dismiss and not as a summary judgment motion, the existence of a genuine issue of fact is of no consequence since the determination of the motion to dismiss is a pure legal determination which assumes all the facts in appellants' favor. Dacey v. New York County Lawyers' Association, 423 F.2d 188 (2d Cir. 1969), cert. den., 398 U.S. 929 (1970). In Point II, appellants really are continuing their campaign in Part I to have the motion to dismiss converted to a motion for summary judgment. Once the premise of their reasoning in Part II is assumed (i.e., the Court did not commit reversible error in dismissing pursuant to Rule 9(b) of the Federal Rules of Civil Procedure), any showing of "genuine issues as to material facts and that this case must go to trial" pursuant to Rule 56 of the Federal

Rules of Civil Procedure is obviously irrelevant.*

CONCLUSION

The dismissal of the fourth complaint, without

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*In Points I and II of their appellate brief, appellants are "playing both sides of the fence" in a desperate attempt to gain reversal of the lower court decision. In Point I they contend, in essence, that the lower court should not have considered various extraneous matters in deciding the motion to dismiss and that by so considering them the Court converted the motion into one for summary judgment. In Point II appellants contend that the Court erred in not considering the same extraneous matter appellants contend the Court erred in considering. In other words, appellants are saying that the Court erred whether or not it considered the extraneous matter. (The obvious fallacy in this approach is appellants' misguided conviction that the Court was deciding or should have been deciding the motions to dismiss using a summary judgment standard.)

Another indication of appellants' self-serving attempts to distort the record is clearly set out in appellants' Point IV. Despite the fact that appellants in Point I assert that the Court considered matters outside the pleading in deciding the motion to dismiss, in Point IV appellants state that "the lower Court determined these Rule 23 criteria in the same manner it erroneously determined defendants' motion to dismiss, i.e., in vacuo, by merely reading the complaint" (p. 53). Thus, appellants themselves concede in Part IV that their argument in Part I is without merit.

leave to amend on the ground that it failed to allege fraud and conspiracy with sufficient particularity should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the above Appellee's Brief was this 25th day of September, 1974 mailed to:

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